EMS BOWE (M) SDN BHD

v.

KFC HOLDINGS (M) BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-22-67-1996]
12 JULY 1999

CONTRACT: *Tender - Failure to award tender - Whether a breach of contract - Draft letter of award - Terms and conditions therein discussed with plaintiff - Whether could be implied that tender was awarded to plaintiff - Whether plaintiff acted upon that knowledge*

AGENCY: *Creation - Whether relationship of agency existed - Whether 2nd defendant employed by 1st defendant - Whether misrepresentation made within scope of 2nd defendant's implied authority - Whether 2nd defendant had limited authority - Whether 1st defendant jointly and severally liable*

The plaintiff brought an action against the 1st defendant for breach of contract. The plaintiff claimed that the 1st defendant wrongfully awarded a tender for the supply, delivery and installation of suspended mineral fibre board ceiling ('the works') to another contractor after agreeing to award the tender to it. It was alleged that the contract was entered through the 2nd defendant who was the agent of the 1st defendant. The plaintiff claimed that the 2nd defendant had prepared a draft letter to award the tender for the works to the plaintiff and that the plaintiff had agreed to the terms and conditions contained therein. The plaintiff was informed that a formal letter would be issued in due course. Based on the 2nd defendant's statement that the plaintiff had been awarded the tender and due to the imminent commencement date for the works, the plaintiff ordered materials for the works in advance. The plaintiff claimed that the 2nd defendant had, in fact, agreed to this and had instructed the plaintiff to do so.

The defendants claimed that there was no binding contract because the 2nd defendant had no authority to award the contract or execute any contract on behalf of the 1st defendant.

Held:

[1] The 1st defendant had not only instructed the 2nd defendant to deal with the plaintiff but had also dealt directly with the plaintiff tenderer. Since the 1st defendant authorised the 2nd defendant to prepare the draft letter of award, the 1st defendant had by implication authorised the 2nd

defendant to communicate to the plaintiff that it was the successful tenderer. Also, the 2nd defendant's conduct was consistent with the belief that the tender had been awarded to the plaintiff by the 1st defendant.

[2] A draft agreement or a draft letter of offer if acted upon with the knowledge or concurrence of the other party or its agent, can no longer be construed as a draft. The draft is therefore converted into a written agreement.

[3] The 1st defendant retained control over the work designated to the 2nd defendant. It followed that the 2nd defendant's employment was one of contract of service, and that the 2nd defendant was the agent of the 1st defendant. It was well within the scope of the 2nd defendant to have informed the plaintiff that it had been awarded the contract for the works and for the plaintiff to have acted on that information.

[4] The 1st defendant's submission that the agency was one for the purpose of inviting tenders and nothing more, was totally unacceptable since the existence of the limited authority had not been brought to the notice of the plaintiff.

[5] The agency arrangement between the 2nd defendant and the 1st defendant need not be in writing (*KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd*). In the circumstances, there was a contract between the 1st defendant and the plaintiff.

[6] The 1st defendant was jointly and severally liable with the 2nd defendant for the representation of the 2nd defendant to the plaintiff because the representation was made within the scope of the 2nd defendant's implied, apparent or ostensible authority. Further, the 2nd defendant had instructed the plaintiff to order the goods in advance to allow for the start of the works early.

[Judgment for the plaintiff.]

Case(s) referred to:
Ho Kam Phaw v. Fam Sin Nin [1998] 3 CLJ 708 ***(refd)***
KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 ***(foll)***
Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Berhad [1996] 2 CLJ 130 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 1(2)
Halsbury's Laws of England, para 135

For the plaintiff - Fiona Barnaby; M/s Cheah Yap & Partners
For the 1st defendant - Ranjan Chandran; M/s Iza Ng Yeo & Kit
For the 2nd defendant - Koh Yew Chong (Shahrir Mohd Salleh with him); M/s Shahrir Ng & Koh

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

By a letter dated 1 August 1995 the 2nd defendant, on behalf of the 1st defendant, invited the plaintiff to submit a tender for the works known as "Proposed Wisma KFC on Lots 543 and 688, Section 57, Jalan Sultan Ismail, Kuala Lumpur – Supply, Delivery and Installation of Suspended Mineral Fibre Board Ceiling" ("the Works").

The plaintiff then by a letter dated 11 August 1995 submitted a tender proposal for the works for the sum of RM511,708.30 which was later corrected by letter dated 15 August 1995 to read RM518,923.90. The plaintiff submitted the tender proposal together with a sum of RM1,000. Subsequently, on 24 August 1995 the plaintiff was requested by the 1st defendant to submit samples of the material to be used for the works. The plaintiff also sent samples of the manufacturer's warranty to the defendant. The plaintiff confirmed that the type of mineral fibre board required by the 1st defendant for the works, that is, the 32/6 panel, was only produced in 15mm x 600 x 600 as too many scores/ panels in 15mm x 600 x 1200 would weaken the board. On or about September 1995, the 2nd defendant prepared a draft letter of award to formalise the award of the works and which said draft letter of award was addressed to the plaintiff.

Case For The Plaintiff

The plaintiff's case is that the 2nd defendant went through the terms and conditions of the letter of award with the plaintiff's managing director and that the plaintiff agreed to the terms and conditions contained therein.

The 2nd defendant then informed the plaintiff that the 1st defendant would issue the formal letter of award to the plaintiff in due course. The 2nd defendant then instructed the plaintiff that *inter alia* the commencement date for the works was mid-October to early November. Due to the imminent commencement date for the works, the plaintiff's managing director informed the 2nd defendant that the materials for the works had to be imported from abroad and that it would take eight to ten weeks to arrive. Thus the plaintiff informed the 2nd defendant of the need to order the goods in advance to be

able to commence and complete the works within the time stipulated. The 2nd defendant agreed and then instructed the plaintiff to order the goods. Relying on the 2nd defendant's statement that the plaintiff had been awarded the works, the plaintiff ordered the materials for the works.

It is the plaintiff's case that in breach of contract, the works were then wrongfully awarded by the defendants to another contractor and that the plaintiff never received the letter of award.

The Claim

The plaintiff brings this action for:

(i) Breach of contract against the 1st defendant upon an agreement entered into between the 1st defendant and the plaintiff through the 2nd defendant, being the defendant's agent for awarding the works to another contractor.

(ii) Negligent misrepresentation against the 2nd defendant for misrepresenting that the contract had been awarded to the plaintiff, and instructing the plaintiff to order the goods in advance as a result of the works being awarded to the plaintiff.

(iii) Negligent misrepresentation against the 1st defendant who is vicariously liable for the negligent misrepresentation made to the plaintiff by its agent, the 2nd defendant.

Case For The Defence

The case of the defendants is that there was no binding contract because the 2nd defendant had no authority to award the contract or execute any contract on behalf of the 1st defendant.

Findings Of The Court

Question Of Agency

(a) The Letter Of Invitation

The letter of invitation by the 2nd defendant to the plaintiff whilst stating the heading as referring to the "Proposed Wisma KFC" commences with a paragraph which reads as follows:

> On behalf of our Client we wish to inform you that you are selected to submit tender for the above works.

The final paragraph of the said letter states as follows:

> All completed tender shall be delivered to the office of Messrs. KFC Holdings (M) Bhd, Level 6, Wisma Hong Leong, 18, Jalan Perak, 50450 Kuala Lumpur not later than 12.00 noon, 14th August 1995 in a sealed envelope endorsed:
>
> > TENDER FOR "PROPOSED WISMA KFC ON LOT 543 AND 688, SECTION 57, JALAN SULTAN ISMAIL, KUALA LUMPUR - Supply, Delivery And Installation of Suspended Mineral Fibre Board Ceiling".

This letter was in the Common Agreed Bundle of Documents (CABD 1 and 2). What is also relevant is a letter dated 24 August 1995 from the plaintiff to the 2nd defendant referring to a telephone conversation between the general manager of the plaintiff and one Kuan Chee Koong (Kuan) relating to the size of the panel, and enclosing a sample of the warranty of the manufacturer. The said letter which also was an agreed document was CABD 16. This letter was copied to the said Kuan. The said Kuan was an employee of the 1st defendant. DW2, Koh Ken Lin, a quantity surveyor by profession and who was with the 2nd defendant at the material time testified in examination-in-chief that the said Kuan who was the project manager of the 1st defendant requested the 2nd defendant to provide quantity surveying services and to act as the project consultant of a contract for ceiling works for the said Works. He also confirmed that all communications on behalf of the 1st defendant was done by Kuan. In fact the general manager of the plaintiff testified in examination-in-chief that Kuan had instructed the plaintiff to liaise with the 2nd defendant and this was never challenged in cross-examination by either defendant. DW2 also testified in examination-in-chief that the 2nd defendant was engaged by the 1st defendant to carry out the said works "on behalf of the 1st defendant". The 2nd defendant had instructed the plaintiff to submit samples directly to the 1st defendant.

Whilst it is conceded by the plaintiff that the 2nd defendant has no authority to award the contract to the plaintiff, the plaintiff contends that communicating the decision to the plaintiff that it was the successful tenderer is well within the apparent scope of authority of the 2nd defendant.

It is admitted by DW2 that sometime in September 1995 he "was **instructed** (emphasis provided) by Kuan of the 1st defendant to prepare a draft letter of award in favour of the plaintiff". He also admitted that he had "gathered information from the plaintiff for confirmation purposes" and then he included "those information in the draft letter of award". The information gathered related to the type of performance bond to be given, the amount of the said performance bond and confirmation that the correct tender price was RM518,923.90 and not RM511,708.30. It is necessary to reproduce a relevant Q/A from the evidence of DW2:

(Q): Why did you require these information in order to prepare the Draft Letter of Award?

(A): We have no knowledge of the terms that were discussed or agreed upon which will normally take place in a meeting or interview between the 1st defendant and the individual tenderers because we were not instructed on anything pertaining to any meeting or interview. We cannot prepare the Draft Letter of Award without these information.

I am therefore satisfied that the 1st defendant had not only instructed the 2nd defendant to deal with the plaintiff but has also dealt directly with the plaintiff tenderer. Since the 1st defendant authorised the 2nd defendant to prepare the draft letter, it is my judgment that the 1st defendant had by implication, authorised the 2nd defendant to communicate to the plaintiff that it was the successful tenderer.

One other factor that I have to remind myself is the failure of the defendants to call Kuan to testify. The explanation that he would be unable until the second half of December 1998 is totally unacceptable. Evidence was led that he was at the time of the trial engaged in the construction and commissioning of a military fuel depot for the Ministry of Defence, Brunei. Other than the self-serving evidence of DW1 the senior general manager of the 1st defendant, no letter was submitted to this effect from the Ministry of Defence, Brunei. If his evidence was so crucial, no request for an adjournment was made to take his evidence in Brunei. In any event, this case was continued even on 6 January 1999. Yet no attempt was made to call Kuan. I am therefore constrained to invoke s. 114(g) of the Evidence Act 1950 against the 1st defendant for failing to call Kuan to testify.

(b) The Tender

PW1, the general manager of the plaintiff, testified that the plaintiff accepted the offer made by the 1st defendant through the 2nd defendant as contained in the draft letter of award. To my mind the defendants' contention that they had never accepted the plaintiff's tender does not reflect the true picture. Whilst the plaintiff had responded to the invitation to tender it is pertinent to note that there has been no formal written letter of rejection ever issued to the plaintiff in respect of its tender proposal by the 1st defendant. It is also important to note that the plaintiff's tender deposit was never returned to the plaintiff. I find that the 2nd defendant's conduct was consistent with the belief that the tender had indeed been awarded to the plaintiff by the 1st defendant.

It was the contention of the 1st defendant that a draft letter of award does not constitute a concluded and binding agreement. It is but a draft until it is perfected. In support the defendant relied on *Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Berhad* [1996] 2 CLJ 130; [1996] 2 AMR 1838. In

that case the court held, and rightly so, that a draft judgment did not have the force of law and that it needed to be perfected before being regarded as a judgment of the court. The 1st defendant urged me to apply the same rationale to a draft of any document like the draft of this letter of award. I cannot accept that. The decision in *Teoh Soon Kok* is based on the principle that until perfected, the terms of an order of the court cannot be enforced either by execution or any other mode of enforcement. Whereas a draft agreement or a draft letter of offer whilst notionally being a draft, yet if it is acted upon with the knowledge or concurrence of the other party or its agent, can no longer be construed as a draft. The draft is therefore converted into a written agreement, based on the fact that one party had acted upon the terms, with the knowledge and concurrence of the other party. The 1st defendant also relied on *Ho Kam Phaw v. Fam Sin Nin* [1998] 3 CLJ 708; [1998] 2 MLJ 713 CA. In that case both the appellant and respondent were partners of a legal firm and since differences arose between them, they decided to terminate their partnership. Though the partnership was dissolved, there were certain assets retained by the respondent which were to be divided and settled between the parties. Negotiations were proceeding. The respondent, through his solicitors forwarded a draft settlement to the appellant. The appellant executed photostat copies of the faxed draft and forwarded the same to the respondent's solicitors. It was contended by the appellant that the faxed draft constituted the final draft of the deed of settlement and that the appellant signed it to confirm that he agreed to the terms of the settlement. On the other hand the respondent contended that the facsimile was a mere proposal and that he had not agreed to the terms as contained in the facsimile. The issue before the court was whether the fax sent constituted an unqualified offer from the respondent's authorised agent (the solicitor) which the appellant was at liberty to accept so that an enforceable contract would immediately have come into being without any further formality.

The Court of Appeal held that the faxed draft was an offer by the appellant's solicitors on the appellant's behalf to the respondent's solicitors for the respondent to settle on the terms of the faxed draft and no more. The respondent had not accepted the appellant's offer as he had not signed the faxed draft.

There was therefore no contract binding between the parties.

Unfortunately no evidence was led by the 1st defendant that the 2nd defendant was an independent contractor and that their relationship was one of contract for service. It is clear from the evidence adduced that the 1st defendant had been instructing the 2nd defendant in respect of the said works. Clearly the 1st defendant retained control over the work designated to the 2nd defendant. In the circumstances I am constrained to hold that the 2nd defendant's employment was one of contract of service. Once the 2nd defendant is found

to be employed by the 1st defendant then clearly the 2nd defendant is the agent of the 1st defendant. In fact *Halsbury's Laws of England* 4th Edn, vol. 1(2) states as follows:

> The relation of agency arises whenever one person, called 'the agent', has authority to act on behalf of another, called 'the principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. ... The essence of the agent's position is that he is only an intermediary between two other parties.

In the case before me DW1 admitted that the 2nd defendant was the intermediary between the 1st defendant and the plaintiff. In the circumstances it was well within the scope of the 2nd defendant to have informed the plaintiff that it had been awarded the contract for the works and for the plaintiff to have acted on that information. In fact *Halsbury's Laws of England* again at para 135 states as follows:

> Where a principal, in conferring authority upon his agent to act on his behalf, imposes conditions or limitations on its exercise, no act done by the agent in excess of the conditional or limited authority is treated as the act of the principal as regards such persons as have or ought to have notice of such excess of authority, or have had notice of an irregularity placing them upon inquiry as to whether the agent's authority was being exceeded. In the absence of notice, however, the principal cannot escape liability for acts done by the agent which fall within the apparent scope of his authority, by any particular instructions to his agent limiting his authority.

In the light of this passage from Halsbury's the submission of the 1st defendant that even if the 2nd defendant can be classified as being an agent of the 1st defendant the agency is one for the purpose of inviting tenders and nothing further, is totally unacceptable since the existence of the limited authority (if any) had not been brought to the notice of the plaintiff.

It is also my judgment that the agency arrangement between the 2nd defendant and the 1st defendant need not be in writing (see decision of Court of Appeal in *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233). I therefore have no hesitation in finding that there indeed was a contract concluded between the 1st defendant and the plaintiff and that it is not open to the 1st defendant to now contend that there was none.

Alternatively Was There Misrepresentation By The 2nd Defendant?

The 2nd defendant told the plaintiff that the 1st defendant had awarded the contract to the plaintiff. It is the plaintiff's contention that it was this representation that induced the plaintiff to act and hereby to sustain loss.

Further it was argued that the 2nd defendant was in a position where it owed the plaintiff a duty of care as the intermediary between the 1st defendant and the plaintiff.

It is a fact no doubt that the plaintiff relying on the 2nd defendant's statement, ordered the goods. However, it is also a fact that the contract was subsequently awarded to another contractor, thereby causing loss and damage to the plaintiff. Considering the facts of the case it is my judgment that even assuming that the 2nd defendant might not have been authorised expressly by the 1st defendant to inform the plaintiff, the 1st defendant is jointly and severally liable with the 2nd defendant for the representation of the 2nd defendant to the plaintiff because such a conveyance of the information to the plaintiff by the 2nd defendant is within the scope of the 2nd defendant's implied authority or within the scope of his apparent or ostensible authority to make such representation as to the award of the contract.

Tender Not According To Specifications

The 1st defendant pleaded that in any case the tender offer by the plaintiff was not according to the tender specifications. I note that PW1 testified that he supplied samples of the materials to Kuan of the 1st defendant, namely Nittobo Mineral Fibre Board 15mm x 600 x 1200 with 8 squares, pursuant to the 1st defendant's request made through the 2nd defendant (see CABD12). Kuan never attended court to refute this. Kuan in fact accepted this. Therefore I find that this allegation of the defendants is unmeritorious.

Plaintiff Ordered Goods At Its Own Risk

Another defence raised by the 1st defendant was that since there was no contract the plaintiff had ordered the goods at its own risk. In the light of my earlier finding that there was indeed a concluded contract this argument must perforce fail.

2nd defendant did not instruct to order the goods nor made offers to the plaintiff

The 2nd defendant argued that it had not given any instructions to the plaintiff to order the goods nor did it make any offers to the plaintiff. It is interesting to note that both DW1 and DW2 testified that they assumed that written approval for the ordering of the goods had to be obtained from the 2nd defendant since there was no architect for the project. On this alone it is sufficient for me to accept the evidence of the plaintiff (PW1) that the 2nd defendant had indeed instructed the plaintiff to order the goods in advance to allow for the start of the works early. I therefore find for the plaintiff against both defendants.

Quantum

The plaintiff's claim is for the sum of RM372,192.12 made up of as follows:

(a) Loss of profits	RM67,776.12
(b) Cost of storing the goods at the warehouse @ RM8,658.00 per month from 11 December 1995 to 9 February 1996 and continuing	RM 17,316.00
(c) Cost of goods amounting to	RM287,100.00
	RM372,192.12

The plaintiff had led evidence to prove all of these items. It is trite law that the onus is on the plaintiff to specifically plead and prove its loss.

In response to the allegation that no proof has been tendered, the plaintiff relied on CABD 5 and 6 to show that the total contract sum was RM500,583.90 (that is, the total area of works being 13,441 + 1,283 + 750 = 15,474 metres square x RM32.35 per metre square being the contract price). PW1 adduced evidence that the plaintiff's total cost of supply and installation for the 15,474 metres square at RM29.97 amounted to RM432,807.78. Therefore if the contract had been awarded to the plaintiff, the plaintiff contended it would have made a profit of RM67,776.12 (RM500,583.90 - RM432.807.78). Neither of the defendants challenged these figures since the defence was that there was no contract.

As for the cost of the goods amounting to RM287,100 PW1 adduced evidence by explaining with reference to CABD 23 that the total purchase price was S$116,000 and that at an exchange rate then prevailing of RM1.80 this amounted to RM208,800 and logging on a 25% import tax and a 10% government tax the total sum paid amounted to RM287,100. Again, neither this figure, nor the calculations, was ever challenged.

As for the cost of warehousing, the sum of RM17,316 was fully justified by PW1. He explained in examination-in-chief that the cost per shipment was S$2,405.40 and since there were 2 containers, this amounted to S$4,810.80. And again working on an exchange rate of RM1.80 it worked out to RM8,658 per shipment. Since there were 2 shipments the total warehousing costs amounted to RM17,316. I therefore give judgment for the plaintiff against the defendants in the sum of RM372,192.12 with interest at 4% per annum from the date of service of the writ on the defendants to date of judgment and costs.